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INDIVIDUAL INTERESTS IN THE DOMESTIC RELATIONS.*

I. NATURE OF THE INTERESTS.[1]

IT IS important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions. This social interest must play an important part in determining what individual interests in such relations are to be secured, how far they are to be secured and how they are to be secured. Yet its chief significance is not in connection with securing interests in the domestic relations against the rest of the world but rather in connection with the conflicting interests of the parties to such relations among themselves, the curtailments of normal legal capacity or even of normal legal rights which the maintenance of these relations as social institutions may involve or may render expedient, and the recognition in whole or in part of the family as an economic entity whose interests of substance may require securing even at the expense of the individual interests of substance of particular members.

In the present connection we have to do only with the individual interests of the individual parties to domestic relations in the maintenance and integrity thereof and with the securing of these interests both against the world at large and between the parties. They are wider than the individual personality, they involve more than the individual body and life, and yet they are intimately related thereto. Also they have an ecomonic side. But they are not wholly economic

* The substance of this paper will appear in Chapter X of a book entitled "Sociological Jurisprudence," now in preparation. As to the theory of interests and mode of treatment reference should be made to my paper "Interests of Personality," 28 Harvard Law Review 343.

[1] Green, Principles of Political Obligation, §§ 233-235; Kant, Metaphysische Anfangsgründe der Rechtslehre, §§ 22-23; Lasson, System der Rechtsphilosophie, § 48, 6. See also my paper on "Interests of Personality," 28 Harvard Law Review 343, 351 ff.

like the interests of substance. The relations themselves are both personal and economic.[2] Hence the individual interests therein partly involve the individual personality, the feelings, the affections, the honor of the individual, but also partly involve the individual substance so far as the relations incidentally give individual economic advantages.[3]

Accordingly two elements must be taken into account in securing interests in domestic relations. On the one hand there is the individual spiritual existence. From the beginning the social interest in general security has required that the law secure adequately this feature of these relations, since injuries thereto touch men on their most sensitive side, and no injuries are more certain to provoke self-redress and even private war. With the development of civilization, the social interest in the moral and social life of the individual, *i. e.*, in his claim to a social existence as a human being, reinforces this requirement. On the other hand, there is the individual economic existence in which the purely economic side of such relations may be of great importance. Here, sometimes, along with the social interest in the individual moral and social life, the social interest in the relations as social institutions may require careful securing of the purely economic advantages. An example may be seen in legal provisions for support of dependent wives and children. At other times the social interest in the individual life may demand that the individual economic advantages of one of the parties to the relation be less regarded. For example, in a balancing of marital interests with the individual interests of the wife, it may be expedient to leave the purely economic advantage of the husband unsecured as against the wife or secured but partially.

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[2] "The mine and thine with respect to this right is domestic and the relation involved is that of a community of free beings who, through reciprocal influence according to the principle of external freedom (causality) form an association, a collectivity of persons living in community, which is called the household. The mode in which this social status is acquired and the functions that prevail within it are due neither to an arbitrary act (facto) nor mere agreement (pacto) but solely to law (lege). And this, since it is at the same time a right with respect to a person and a possession with respect to that person, must be a right lying outside of all real or personal right as such, namely a right of humanity in our own person." Kant, Rechtslehre, § 22.

[3] "A German would express the peculiarity of the rights now under consideration by saying that, not only are persons the subjects of them, but persons are the objects of them. By the 'subject' of rights he would mean the person exercising them or to whom they belong; by 'object' that in respect of which the rights are exercised. * * * So much for the peculiarity of family rights as distinct from all other rights. The distinction is not merely a formal one. From the fact that these rights have persons for their objects there follow important results * * * in regard to the true nature of the right, to the manner in which it should be exercised." Green, Principles of Political Obligation, 231-232.

2. DEVELOPMENT OF INDIVIDUAL INTERESTS IN DOMESTIC RELATIONS.[4]

Individual interests in the domestic relations require to be secured in two aspects. On the one hand they must be secured as between the parties thereto. On the other hand they must be secured as against the rest of the world. As it is commonly put, the law has to give effect to the right of the one party to the relation against the other and enforce the corresponding duty toward the former, and also to give effect to the right of each against the whole world not to have the relation interfered with by outsiders. The law has never attempted to deal fully with the first of these tasks. Religion, *boni mores* and the internal discipline of the household have largely sufficed to secure the interests of the members of the household, as among themselves,[5] and little has been needed beyond legal recognition and limitation of domestic discipline. The other task, on the contrary, has called forth a great deal of law. Here, as elsewhere, individual interests have been developed from group interests. But a further development has been required, namely, a development of individual interests of dependent members of the household, not only as against the world at large but also as against the husband or parent.

As in other cases, individual interests in the domestic relations are gradually disentangled from group interests. Here, however, the course of development is relatively a long one. In Roman law we find all manner of interests of dependent members of the household so treated as interests of the head of the household as to show that he is standing legally for a group of kindred which is or was the jural unit. Thus, for example, injury to dependent members of the household is legally cognizable as *iniuria* (insult) to the head; the *paterfamilias* is insulted through the intentional injury to one of his household.[6] Accordingly the first stage in the legal development of

[4] Gide, Etude sur la condition privée de la femme (2 ed. by Esmein, 1885); Post, Entwickelungsgeschichte des Familienrechts, §§ 41-43; Jhering, Geist des römischen Rechts (5 ed.) II, § 32a; Maine, Ancient Law, Chap. 5; Maine, Early Law and Custom, Chap. 8; Miller, Lectures on the Philosophy of Law, 167 ff.

[5] Voigt, Zwölf Tafeln, I, § 15. "Even down to the end of the republic, not a little. * * * remained solely under the guardianship of the family tribunal or the censor's regimen morum. Its function was two-fold; for sometimes it operated in restraint of law by condemning—though it could not prevent—the ruthless and unnecessary exercise of legal right, as, for example, that of the head of a house over his dependents, and sometimes it operated supplementarily, by requiring observance of duties that could not be enforced by any compulsitor of law. Dutiful service, respect and obedience (obsequium et reuerentia) from inferiors to superiors * * * were among the officia that were thus inculcated. * * *" Muirhead, Historical Introduction to the Private Law of Rome (2 ed.) 21-22.

[6] Gaius, III, §§ 221-222.

this subject treats these interests solely as individual property interests of the head of the household. Before the law the interest is one of substance—the interest of a freeman in the control of those subject to his power. Wife in *manus*,[7] child in *potestas*,[8] and slave in *mancipium*[9] in the eyes of the law stand as property, to be protected, transferred and dealt with as other objects of ownership. In a second stage property interests of wives and children begin to be recognized and the identification of the legal unit with the moral unit in the stage of equity and natural law leads to recognition of interests of personality in wife, child and slave and a consequent abrogation of the *ius uitae necisque*.[10] In the case of wife and child, the recognition of these interests leads to restriction of the disciplinary power of the head of the household to correction and restraint of those who from tender years and want of discretion require to be cared for.[11] Presently in a fourth stage individual interests of the wife and of the dependent child are definitely disentangled from group interests and come to be emphasized through recognition of the social interest in the moral and social life of the individual, which calls especially for legal securing of a human life to those who are dependent.

Along with the development of individual interests at the expense of the interests of the head of the household, there has been a progressive breaking-down of the household as an entity ruled from within and an agency of social control. Hence what could once be done through religion and *boni mores* and the household discipline has to be achieved, at least as to the ethical minimum, through the law. Accordingly we see attempts in Roman law, after the household regime had broken down, to give legal efficacy to duties of reverence and gratitude and piety in household relations. Likewise in modern law not only duties of care for the health, morals and education of children, but even truancy and incorrigibility are coming

[7] "Manus, the hand, is the natural symbol, and seizing or holding with the hand is the exercise of power." Goudy's note to Muirhead, Historical Introduction to the Private Law of Rome (2 ed.) 60. "Moreover [Romulus enacted that] one who sold his wife should be sacrificed to the infernal gods." Plutarch, Romulus, 22. See Aulus Gellius, XVIII, 6, §9; Gaius, I, §§ 115b, 117, 118, 136; Carle, Le Origini del Diritto Romano, 196 ff.

[8] Dig. XLIII, 30, 1, pr. and §§ 1, 5; id. XLIII, 30, 3, pr.; Gaius, I, §§ 117, 118; Mosaicorum et Romanorum Legum Collatio, IV, 8; Cod. IV, 43, 1-2.

[9] Buckland, Roman Law of Slavery, 10 ff.

[10] Dig. XLVIII, 8, 2; id. XLVIII, 9, 5; Gaius, I, § 53.

[11] Whitfield v. Hales, 12 Ves. 492; Reg. v. Hopley, 2 F. & F. 202, 206; Queen v. Jackson [1891] 1 Q. B. 671, 681; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, § 341. Cf. Cod. VIII, 46 (47) 3.

under the supervision of juvenile courts and courts of domestic relations,[12] where in the past there was little or no occasion for the law to think of them.

3. INTERESTS OF PARENT AND CHILD.[13]

There are four types of interest in the domestic relations which the law is called upon to secure. These are (1) interests of parents, demands which the individual may make growing out of the parental relation; (2) interests of children, demands which the individual may make growing out of the filial relation; (3) interests of husbands, demands which the individual husband may make growing out of the marital relation; and (4) interests of wives, demands which the individual wife may make growing out of the marital relation. In each case, as has been said above, claims may be made against the world at large and also against the other party to the relation. Professor Wigmore in the best analytical discussion of the subject which has appeared, states interests of parents as against the world at large thus:

> "A parent has an interest in his relation with his child. The elements of this interest are three: (1) The industrial *services* received from the child; (2) the social *pleasure* ministered by the child; (3) the chastity of a female child, as ministering to the parent's sentiments of family self-respect and honor."[14]

Restating these to conform to the order in which other interests have been stated, we may say that the parent has three interests that require securing against the world at large. (1) The first, as parents may urge it, should perhaps be put more broadly than Professor Wigmore needed to state it for the purposes of the law of torts. Parents may and do claim not merely the society of their children, as ministering a social pleasure, but the custody and control of them, especially while they are of tender years, and the power to dictate their training, prescribe their education and form their religious opinions. All these things are claimed, as it were, as a part of the parent's personality. (2) The chastity of a female child, also, is so

[12] See Flexner & Baldwin, Juvenile Courts and Probation, 3-11; Eliot, The Juvenile Court and the Community, Chaps. 13, 14.

[13] Wigmore, Summary of the Principles of Torts, §§ 29-36; Wigmore, Interference with Social Relations, 21 Am. Law Rev. 764; Eversley, Law of the Domestic Relations, Pt. II, Chap. 2; Atherley Jones and Bellot, Law of Children and Young Persons, Chaps. 2-4; Breckenridge and Abbott, The Delinquent Child and the Home.

[14] Summary of the Principles of Torts, § 30.

intimately connected with the honor of the family and the self-respect and mental comfort of the parent, that the interest in maintaining it is asserted as a phase of the parent's interest of personality. (3) The remaining claim, the claim to the services of the child, is an interest of substance, and as a purely economic claim does not differ from the interest in other economically advantageous relations. As between parent and child immediately the parent may claim obedience and respect as matters related to his personality, and, as interests of substance, service for the profit of the household and, in case the parent is indigent, support from a child of age, capacity and sufficient means.

Mere statement of the claims which parents may make with respect to or against children makes it evident that certain other interests must be weighed against these individual interests of parents. Under more primitive social conditions the group interests of the family or kindred largely dictated the legal delimitation of parental and filial interests. In modern times the individual interests of the child came to be given greater weight. Today certain social interests are chiefly regarded. These are on the one hand a social interest in the maintenance of the family as a social institution and on the other hand a social interest in the protection of dependent persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future. The parent's claim to custody of the child and to control over its bringing up has come to be greatly limited in order to secure these interests.[15]

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[15] As to the extent of the common-law right securing the individual interest of the parent, see the remarks of Lord Esher in Queen v. Barnardo [1891] 1 Q. B. 207, 208-209, and compare the observations of the same judge as to the difference between the rights of a parent and those of a legal guardian in In re Agar-Ellis, 24 Ch. Div. 317. See also Ex parte Skinner, 9 Moore, 278; Re Plumley, 54 Law Times Rep. 284; Dunklin v. Seifert, 123 Ia. 64; Gilmore v. Kitson, 165 Ind. 402; Stapleton v. Poynter, 111 Ky. 264; Giffin v. Gascoigne, 60 N. J. Eq. 256.

For a balancing of the interest of the parent as to custody with that of the child, see People v. Sinclair, 91 App. Div. 322; U. S. v. Savage, 91 Fed. 490; McDonald v. Stitt, 118 Ia. 199; Hussey v. Whiting, 145 Ind. 580; State v. Anderson, 89 Minn. 198; Giffin v. Gascoigne, 60 N. J. Eq. 256.

Balancing of the individual interests of the two parents and of the interest of each with the social interest in the family as a social institution; English Guardianship of Infants Act, 49 & 50 Vict. c. 27, §§ 2, 3; English Licensing Act, 1902, § 5; New York Domestic Relations Law, § 40; In re A and B, Infants [1897] 1 Ch. 786; People v. Sinclair, 47 Misc. 230.

Balancing of the parental and social interests in case of delinquent children; Wadleigh v. Newhall, 136 Fed. 941.

Balancing of the parent's claim to dictate training and prescribe education with interest of the child and with social interests: English Elementary Education Act, 1876 (39 & 40 Vict. c. 79) § 4; State v. Bailey, 157 Ind. 324; State v. Ferguson, 95 Neb. 63.

Of the three parental interests that call for securing against the world at large, our law today secures the third fully by an action for damages against a wrongdoer who interferes with the relation[16] and by requiring one who profits at the expense of the parent through the child's services to restore the unmerited benefit which he has received.[17] These remedies are entirely adequate to the purely economic interest. The first and second, as they are in the nature of interests of personality, encounter the difficulties involved in securing personality through rules of law and judicial machinery. As to the first, the parent's interest in society and control of children is secured against strangers by the writ of *habeas corpus,* by the jurisdiction of courts of equity, preventive and remedial, and by an action for damages against one who interferes with the relation, in which the injury to the feelings of the parent, to a limited extent only, are made the basis of a reparation, as it were, parasitic to the claim for injury to the economic relation.[18] But of late the law has put many

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Balancing of the parent's claim to form the child's religious opinions with the interest of the child; In re Newton [1896] 1 Ch. 740; with social interests: Flexner & Baldwin, Juvenile Courts and Probation, 87. As to the common-law right securing the interest of the parent, see: In re McGrath [1893] 1 Ch. 143; In re Scanlan, 40 Ch. Div. 200; In re Marshall, 33 Nova Scotia, 104; Guardianship of Jacquet, 40 Misc. 575. This right is preserved in recent English legislation. Children Act, 1908, § 66.

Balancing of the parent's claim to services and productive labor of the child with the interest of the child and with social interests: English Employment of Children Act, 1903; Scott, Child Labor; Summary of Laws in Force (1910).

[16] Hall v. Hollander, 4 B. & C. 660. "The incidental expenses incurred in consequence of the injury can be recovered; but where the loss of service by the parent cannot be sustained, it is very doubtful whether the parent could recover for such expenses, though under an obligation to incur them." Eversley, Domestic Relations (3 ed.) 581. American courts allow recovery in such cases. Trow v. Thomas, 70 Vt. 580; Southern R. Co. v. Covenia, 100 Ga. 46; Covington St. R. Co. v. Packard, 9 Bush. (Ky.) 455; Callaghan v. Ice Co., 69 N. J. Law 100; Gulf C. & S. F. R. Co. v. Beall, 91 Tex. 310.

[17] Thompson v. Howard, 31 Mich. 309.

[18] "The right of the parent to maintain an action for a tort done to his child is based upon the relation or quasi-relation of master and servant." Eversley, Domestic Relations (3 ed.) 580. In case of assault or battery upon the child, "no compensation is given for wounded feelings," whereas in an action for seduction of a daughter (brought on the theory of loss of service) "what are known as 'sentimental damages' may be given." Id. 583. Mr. Eversley says in this connection: "This is an instance of the bad logic of the action as now founded." Ibid. "But the jury are not at liberty to consider the fact that the plaintiff has been deprived of the comfort and society of the child, nor can they consider any physical or mental suffering or pain which may have been sustained by the parent by reason of the injury to the child. * * * In short the measure of damages in such a case is the same as that which obtains in a case brought by a master for the loss of services of his servant or apprentice. It is therefore practically a business and commercial question only, the elements of affection and sentiment have no place therein." McGarr v. National Mills, 24 R. I. 447. A few American jurisdictions have abandoned the theory of loss of service in these cases and rest them on the interest in the domestic relation. Anthony v. Norton, 60 Kan. 341; Howell v. Howell, 162 N. C. 283 (abduction of child).

[19] Andrews v. Askey, 8 C. & P. 7; Grinnell v. Wells, 7 Manning & Gr. 1033.

limitations upon the parent's claim to custody of children and to control of their training and bringing up. The second interest was secured at common law by an action for loss of service based in theory upon the economic interest of the parent with an incidental reparation for the more significant interest of the parent in the domestic relation.[19] The basis of the action in loss of service became presently a mere fiction.[20] But the law on this subject has been much embarrassed thereby and perhaps has been embarrassed also by the difficulty that the individual interest of the seduced child had no direct security since the latter was precluded from recovery because of the maxim *uolenti non fit iniuria*.[21] There is no sound reason today for preserving the fiction nor for refusing to rest the action avowedly upon the interest of the parent in the chastity of the child[22] and there is a tendency to dispense with the historical embarrassments and establish the remedy on a proper basis by legislation or judicial decision.[23]

Turning to the claims of the parent against the child, legal security is given to the interest in respect and obedience, so far as such interests admit of effective securing through law, by the internal discipline of the household, backed up by the legal privilege of "moderate correction."[24] Today this is reinforced to some extent by the powers of juvenile courts with respect to truancy and incorrigibility.[25] The claim of the parent to the services of the child for the profit of the household is secured in the same way and also by the legal right of the parent, as between parent and child, to the latter's earnings.[26] But legal recognition of this interest is much restricted today in

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[20] Pollock, Torts (5 ed.) 217, 218; McClure v. Miller, 11 N. C. 133. See Paul v. Frazier, 3 Mass. 71.

[21] E. g. "If the loss of health is caused by mental suffering which is not the consequence of the seduction [i. e. directly, as in case of pregnancy], but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of service is too remote a consequence * * * and the action cannot be maintained." Abrahams v. Kidney, 104 Mass. 222. "The quasi fiction of servitium amisit affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers." Serjeant Manning's note to Grinnell v. Wells, 7 Manning & Gr. 1023, 1044. Cf. also the difficulties where a daughter of age is seduced. Sutton v. Huffman, 32 N. J. Law 58.

[22] Pollock, Torts (5 ed.) 216-218; Wigmore, Summary of the Principles of Torts, § 34.

[23] Anthony v. Norton, 60 Kan. 341; Snider v. Newell, 132 N. C. 614; Kirkpatrick v. Lockhart, 2 Brev. (S. C.) 276; Mich., How. Ann St. (2 ed.) § 13133.

[24] 1 Blackstone, Comm. 452; English Children Act, 1908, § 37.

[25] Eliot, The Juvenile Court and the Community, 16.

[26] Osborn v. Allen, 26 N. J. Law, 288. This case involves an interesting question as to balancing the individual interests of father and mother as to the child's earnings and the social interest in the family as a social institution. See also Matthewson v. Perry, 37 Conn. 435; Hollingsworth v. Swedenborg, 49 Ind. 378; Pray v. Gorham, 31 Me. 240; Clay v. Shirley, 65 N. H. 644.

view of the social interests which are secured by legislation as to child labor. On the other hand, the interest of the indigent parent in support by a child of age, capacity and sufficient means, an interest which is reinforced by the moral sentiment of mankind and by the social interest in the moral and social life of the individual, was not recognized by the strict law.

In Roman law the duty of children to support parents in case of need, as a duty of gratitude and piety, was turned from a moral duty into a legal duty during the stage of equity and natural law. From the time of the empire this duty and the corresponding duty of the parent with respect to children, as duties of piety, were enforceable *extra ordinem* as legal duties.[27] The principle of reciprocal duties of support on the part of ascendants and descendants passed from the civil law into the modern codes and is universally recognized in the Roman-law world.[28] In the Anglo-American system the court of chancery did not take hold of this subject and it was left to modern legislation which is by no means universal.[29]

As against the world at large a child has an interest in the relation because of the support he may expect by virtue thereof while infancy or, after majority, circumstances precluding self-support render it improper or impossible for him to be left to himself. Also he has an interest in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. At common law there are no legal rights which protect them.[30] In case the parent is killed through the wrongful act of another, the legislation which goes by the name of Lord Campbell's Act usually takes account directly of the interest of dependent children.[31] Also in many jurisdictions the "civil damage acts," which create liability for sale of intoxicating liquor to a parent whereby through intoxication the parent is killed or disabled or rendered incompetent to provide, secure immediately the interest of the child in the relation which involves support and protection.[32]

As against the parent, the child may claim: (1) Support during infancy; (2) education and training so far as the situation of the parent permits, and (3) in case of indigent children of mature years

[27] Dernburg, Pandekten (8 ed.) II, § 431.

[28] French Civil Code, Art. 205; Baudry-Lacantinerie, Précis de droit civil, I, §§ 502-531; German Civil Code, §§ 1601-1615; Crome, System des deutschen bürgerlichen Rechts, IV, § 604; Bell, Principles of the Law of Scotland, §§ 1630-1634.

[29] As to the common law, see Schwerdt v. Schwerdt, 235 Ill. 386. As to American legislation see Kales, Cases on Persons and Domestic Relations, 48, n. 10.

[30] 3 Blackstone, Comm. 142.

[31] There is an excellent summary of this legislation and of the questions to which it gives rise in the present connection in Wigmore, Summary of the Law of Torts, § 48.

[32] Black, Intoxicating Liquors, Chap. 13.

who are unable to support themselves, maintenance at least so far as the parent can afford. The first two, however, are not secured directly by the law, and derive their sanction almost wholly from morals.[33] Recent legislation making desertion of wife and child a crime proceeds rather upon social interests and only operates indirectly to secure the individual interest of the child. This is true also of legislation as to compulsory education. The third interest is protected in Roman-law jurisdictions by the doctrines as to reciprocal duties of support of ascendants and descendants heretofore considered and in common-law countries by the legislation referred to in the same connection.[34]

It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand. "The courts of law," said Lord Eldon, "can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father."[35] That is, the interests of a parent may be secured without much if any conflict with other interests. This is less true than formerly, but in general it remains true that the social interest in the family as a social institution requires the law to proceed with great caution in securing the interests of children against their parents. As one court has said:

> "The delicate parental duty which requires of a child submission to reasonable restraint, and demands habits of propriety, obedience and conformity to domestic discipline, may induce a minor to abandon his father's home rather than submit to what may seem to the parents proper discipline and necessary restraints of the household. It would be intoler-

[33] At common law there was no liability on the part of the parent to support the child. Hence the child has no action against the parent. Huke v. Huke, 44 Mo. App. 308. Hence also a third person who supplies the child with necessaries may not recover as upon quasi-contract. Shelton v. Springett, 11 C. B. 452; Gotts v. Clark, 4 Ill. 179; McCrady v. Pratt, 138 Mich. 203; Peacock v. Linton, 22 R. I. 328. But there has been some tendency to encroach upon this doctrine where a divorced wife has been compelled to assume the support of the children of the marriage. Stanton v. Willson, 3 Day 37; Cooper v. McNamara, 92 Ia. 243; Gilley v. Gilley, 79 Me. 292; Alvey v. Hartwig, 106 Md. 254; Finn v. Adams, 138 Mich. 258; Pretzinger v. Pretzinger, 45 Ohio St. 452. Contra: Selfridge v. Paxton, 145 Cal. 713; Ramsey v. Ramsey, 121 Ind. 215; Kelley v. Davis, 49 N. H. 187; Brown v. Smith, 19 R. I. 319. Also if the wife lives apart from the husband owing to his fault and is allowed by him to take the children or is left by him to support them, her power to pledge his credit for necessaries includes necessaries for the children. Bazeley v Forder, L. R. 3 Q. B. 559; McMullen v. Lee, 78 Ill. 443; Reynolds v. Sweetser, 15 Gray 78; Gill v. Read, 5 R. I. 343. English legislation makes provision for support by parents of children removed from their custody because of the cruelty of the parent or delinquency of the child. Children Act, 1908, §§ 22, 75. Cf. also Cal. Civil Code, § 203; Hutchinson v. Hutchinson, 124 Cal. 677.

[34] Supra notes 28 and 29.

able if any one who should choose to furnish a minor necessaries, under all circumstances could compel a father to answer to a court or jury concerning the propriety of the family discipline. If this were allowed, a child impatient of parental authority might be incited to set at naught all reasonable domestic control by holding over his father's head the alternative of allowing him his way at home, or of paying for his support abroad. Accordingly it has been said no one shall take it 'upon him to dictate to a parent what clothing the child shall wear, at what time it shall be purchased, or of whom. All that must be left to the discretion of the father or mother.' *Bainbridge* v. *Pickering*, 3 W. Bl. 1325."[36]

But this balancing of the interest in maintaining the family as an institution will by no means account for the extent to which the older law neglected the individual interests of children and the social interest in the moral and social life of dependent members of the household. It must not be forgotten that family law in general is one of the earliest branches of the law to become fixed and hence preserves traces of an archaic condition in which group interests rather than individual interests were secured. Tenderness of the individual interests of parents, since legal interference in family relations touches individuals in a peculiarly sensitive spot, has induced hesitation in changing the established rules, even where reasons for change were evident.[37] Furthermore practical reasons, growing out of the exigencies of judicial administration operate to preclude securing of some interests both of parent and of child. One of these will be considered presently in connection with marital interests.

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[35] Wellesley v. Duke of Beaufort, 2 Russ. 1, 23.

[36] Ramsey v. Ramsey, 121 Ind. 215. See Clasen v. Pruhs, 69 Neb. 278, 284, 289.

[37] The same consideration has made courts cautious about exercising powers with respect to custody and control of children. Stapleton v. Poynter, 111 Ky. 264; Hernandez v. Thomas, 50 Fla. 522. Mark Twain has satirized this. When Huckleberry Finn acquired wealth, his drunken vagrant father returned to claim his "rights." Thereupon those who had been looking after the boy "went to law to get the court to take me away from him and let one of them be my guardian; but it was a new judge that had just come, and he didn't know the old man; so he said courts mustn't interfere and separate families if they could help it; said he'd druther not take a child away from its father. So Judge Thatcher and the widow had to quit on the business."

"That pleased the old man till he couldn't rest. He said he'd cowhide me till I was black and blue if I didn't raise some money for him. I borrowed three dollars from Judge Thatcher, and pap took it and got drunk, and went a-blowing around and cussing and whooping and carrying on; and he kept it up all over town, with a tin pan, till most midnight; then they jailed him, and next day they had him before court, and jailed him again for a week. But he said he was satisfied; said he was boss of his son, and he'd make it warm for him." Adventures of Huckleberry Finn, Chap. 5.

4. MARITAL INTERESTS.[38]

As against the world at large, the claims which the husband may assert with respect to the marital relation are four. (1) He has an interest in the society of his wife which may be infringed by abducting her, by enticing her away or by so injuring her as to deprive the husband of her companionship. While this interest is not entirely separable from that in the economic advantage involved in the relation, it is on the whole more nearly an interest of personality. (2) He has an interest in the affection of the wife which may be infringed by persuasion or pressure addressed to her mind and will. This interest also is so intimately connected with his spiritual existence and mental comfort as to be in effect an interest of personality. (3) He has an interest in the chastity of the wife, which is so related to his feelings of self-respect and to his honor as to be in effect an interest of personality. (4) He has an interest in the services of the wife in the household. Perhaps it would be better to call this an interest in the relation as economically advantageous. Obviously it is in effect an interest of substance. All four of these interests are secured at common law by legal rights redressed by an action on the case. The first and the fourth are not very clearly differentiated. In either event the deprivation of the wife's service is often spoken of as the significant thing. Yet in an old case the judges spoke of the action as brought "for the loss and damage of the husband for want of her company and aid."[39] And although under modern statutes the wife's time and earnings may be her own and there may be no valuable right to her services, the husband may maintain an action for an injury to the wife which deprives him of her companionship.[40] In effect therefore the action may be for loss of consortium without any loss of service.[41] It is clear also that there is a cause of action where the wife's affections are alienated without more,[42] and in this action for alienation of affections and

[38] Wigmore, Summary of the Principles of Torts, §§ 37-44; Eversley, Law of the Domestic Relations, Chap. 9; Garraud, Traité du droit pénal francais, V, §§ 1865-1891; Liszt, Deutsches Strafrecht (11 ed.) §§ 104, 116.

[39] Hyde v. Scyssor, Cro. Jac. 538.

[40] "The husband also, of course, has a legal right to the society of the wife, involving all the amenities and conjugal rights of the relation. This right of society may be invaded by an act which while leaving to the husband the presence of the wife yet incapacitates her for the marital companionship and fellowship, and such incapacity may be deprivation of her society differing in degree only from total deprivation by her death. For such impairment, so to say, of the wife's society, of his right of consortium, such deprivation of the aid and comfort which the wife's society, as a thing different from mere services, is supposed to involve, he is entitled to recover." McClellan, C. J., in Birmingham S. R. Co. v. Lintner, 141 Ala. 420.

[41] 3 Blackstone, Comm. 140.

[42] "The injury * * * consists in the alienation of his wife's affections with malice or improper motives. * * * The alienation of the wife's affections, for which the law

even more in the action for criminal conversation with the plaintiff's wife, which secures the husband's interest in the chastity of the wife, the essential point is the injury to the honor and "domestic comfort" of the husband.[43] So far, then, as interests that have to do with personality may be protected through actions for money damages, the common law covers the whole field of the husband's interests in this relation. The defect of specific and preventive remedies already noted in the case of interests of personality[44] obtain here also. But there is more excuse in the present connection in that anything in the nature of specific relief would be futile in the general run of cases and usually preventive relief would be impossible. It is seldom that danger of injury to this relation is apprehended before the injury is complete and the acts which threaten injury are likely to be too subtle and intangible to permit of judicial interference in advance.

In Roman law, if the wife was not in *manus*[46] the husband was substantially without remedy for injuries to the marital relation. Buckland says:

> "It does not appear that the husband had the *actio utilis Aquilia* if the wife was injured. There was no civil remedy for adultery. A man had, indeed, an *actio iniuriarum* for an insult to his wife, but only because it was of necessity an insult to himself. The only serious exception to this absence of remedy is a rule which seems to belong to the later law, that if her father or any other person detained a married woman, her husband was entitled to have her produced, so that she could come back if she wished [citing Dig. XLIII, 30, 3]."[46]

As a consequence in Continental Europe these matters are not dealt with as such in the civil codes. Instead they are left chiefly to the penal codes where provision is made for prosecution at the instance of the injured party.[47] This limitation of the power of invoking the penal law to the party to the relation whose interest

gives redress, may be accomplished notwithstanding her continued residence under her husband's roof." Rinehart v. Bills, 82 Mo. 534. Fair persuasion of the wife without improper motive is not actionable. Hutcheson v. Peck, 5 Johns. 196, 210; Schweneman v. Palmer, 4 Barb. 225; Tasker v. Stanley, 153 Mass. 148. Here the interest of the defendant in free expression of his belief and opinion must be balanced against the interest of the husband.

[43] Bigaouette v. Paulet, 134 Mass. 123; Yundt v. Hartrunft, 41 Ill. 9.

[44] See my article "Interests of Personality," 28 Harvard Law Rev. 362-365. But an injunction was upheld in such a case in Ex parte Warfield, 40 Tex. Crim. 413.

[45] Supra, n. 8.

[46] Elementary Principles of the Roman Law, 31.

[47] Garraud, Traité du droit pénal francais, V. § 1884; Liszt, Deutsches Strafrecht, § 116.

therein has been injured shows that the interest secured is primarily individual, and the textwriters so recognize.[48] The actual pecuniary damage in these cases is relatively small, as we recognize in permitting large verdicts by way of punitive damages where there is a wanton injury. Hence the difference between the two systems in result is more formal than substantial. Where specific redress and prevention are impossible and money redress will cover but a small part of the wrong, the infliction of a penalty, which tends in some measure to satisfy the feelings of the injured person and at the same time vindicates the social interest against such wrongs in general is the sole recourse left open to the law. It cannot be said that our common-law actions for the securing of marital interests have achieved as much in practice as they seem to promise in theory.[49]

As against the wife, the first interest of the husband is a claim to the wife's society. The claim used to be put more strongly as one to a certain degree of custody and control of the wife's person[50] and to obedience.[51] But it can hardly be put in this way today except where older ideas of the subjection of women still linger and if a stronger claim were asserted, the individual interests of the wife and the social interest in her individual moral and social life should be deemed decisive. Formerly our legal system secured this interest in three ways, namely, by a marital privilege of restraint and correction,[52] by a suit for restitution of conjugal rights, and by the writ of *habeas corpus* directed to one who harbored the wife apart from her husband. But the privilege of restraint and correction is no longer recognized,[53] the suit for restitution of conjugal rights, in origin an ecclesiastical institution for the correction of morals,[54] is obsolete,[55] and the writ of *habeas corpus* may now be

[48] Liszt, Deutsches Strafrecht (11 ed.) 352, Par. 3.

[49] See Thackeray's satire upon the action for criminal conversation, The Newcomes, vol. 2, chap. xx. Compare also Campbell, Lives of the Chief Justices (1 ed.) III, 67-68. It is significant that in England in 1857 the action for criminal conversation was abolished and in its stead the statute allows the husband in a petition for dissolution of marriage or for judicial separation to claim damages against a corespondent "on the ground of his having committed adultery with the wife of such petitioner." 20 & 21 Vict. c. 85, §§ 33, 59. But a petition for damages only may be filed, where other relief is barred by condonation. Pomero v. Pomero, 10 P. D. 174. See also some observations on civil reparation for adultery and on the damages recoverable, in Garraud, Traité du droit pénal francais, V, § 1883.

[50] Atwood v. Atwood, Prec. Ch. 492; Lord Leigh's Case, 3 Keb. 433.

[51] Lord Stowell in Oliver v. Oliver, 1 Hag. Con. 361, 363.

[52] Bacon, Abridgment, Baron and Feme, B.

[53] Queen v. Jackson [1891] 1 Q. B. 671, 681.

[54] Weldon v. Weldon, 9 P. D. 52, 55.

[55] Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), § 1. This proceeding never obtained in the United States. Cruger v. Douglas, 4 Edw. Ch. 433, 506; Baugh v. Baugh, 37 Mich. 59, 62.

used only when the wife is detained from the husband against her will.[56] Thus, the writ of *habeas corpus* now operates chiefly to secure her interest and is available to secure the interest of the husband only where his interest and hers happen to coincide. Today this interest has no sanction beyond morals and the opinion of the community.

Roman law in the classical period came to the same result. Buckland says:

> "If we treat marriage as a contract, an agreement creating rights and duties between the parties, we have the difficulty that we can find no remedies. If a husband did not maintain his wife or if the wife left her husband or did not show him *reuerentia,* it is not easy to see in the time of Gaius, any direct means by which observance of these duties could be enforced. Divorce can hardly be treated as the remedy, for in the classical law this was quite free to either party whether there had been misconduct or not."[57]

In France a marital privilege of corporal correction was recognized at one time, but has long been obsolete not only in that country but in other countries which had adopted or copied the French civil code.[58] The code lays down expressly that "the wife is bound to live with the husband . . . the husband is bound to receive her."[59] These provisions were formerly enforced *in natura,* but it is now held that such enforcement is obsolete.[60] The German civil code in like manner provides that "the spouses are mutually bound to live in conjugal community."[61] The suit for restitution of conjugal rights still obtains, but the decree is not specifically enforceable.[62] In Roman-law countries, as in those that are ruled by the common law, the chief, if not the only, security for this interest is in the moral sense of the community.

A second interest of the husband as against the wife is a claim to the services of the wife for the benefit of the household. Formerly a wider claim to the wife's services generally was asserted. It may be assumed, however, that no such claim would be advanced today and it is clear that today the law nowhere recognizes so wide an interest. At common law the interest was secured by the privi-

[56] Ex parte Sandilands, 21 L. J. Q. B. 342.
[57] Principles of Roman Private Law, 30-31.
[58] Planiol, Traité élementaire de droit civil, I, §§ 922-923.
[59] Art. 214.
[60] Planiol, Traité élementaire de droit civil, I, § 893.
[61] § 1353; Cosack, Lehrbuch des deutschen bürgerlichen Rechts (5 ed.) II, § 318.
[62] Code of Civil Procedure, § 888.

lege of marital correction already considered and by a legal right to the wife's earnings.[63] But legislation has generally if not universally abrogated the latter and has given the wife full control over her own earnings.[64] The Roman law of the classical period, as has been seen, did not secure the husband's interest as against the wife. In the middle ages the Germanic law brought a large measure of marital control back into the law of Continental Europe which has only just disappeared. In France the law of 13 July, 1907, has given the wife control of her earnings.[65] Likewise the German civil code makes the wife's earnings "privileged property," exempt from the control of the husband.[66] Thus this interest too is substantially unsecured in the law of today.

A third interest may be suggested, not unlike the claim of ascendants and descendants to support, namely, a claim of an infirm and indigent husband to support from a wife of means and ability. It need not be said that no such interest is recognized at common law. Modern legislation, moreover, in taking away from the husband all control over the wife's property and earnings and committing it solely to the wife, has preserved the duty of the husband to support the wife, even if she has property and he has none, without in most cases, recognizing any corresponding claim against her. Miller says of the Married Woman's Property Act of 1881:

> "The husband is deprived of all control of his wife's property; but, strange to say, while he is bound to maintain his wife and children, no corresponding obligation is laid upon her. Without this provision the law is quite unjust and at the same time the symmetry of the rights in the respective estates of the spouses is marred."[67]

A number of states make the separate property of the wife secondarily liable for necessaries furnished the family and under such statutes it has been held that where the husband is infirm and incapacitated, necessaries furnished him are included.[68] But these stat-

[63] Offley v. Offley, 3 Scott N. R. 372.

[64] English Married Woman's Property Act, 1870, 33 & 34, Vict. c. 93, § 1.

[65] Planiol, Traité élementaire de droit civil (3 ed.) III, § 1045.

[66] § 1367.

[67] Lectures on the Philosophy of Law, 173. But see English Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93, § 14, providing that a married woman who has separate property may be required to maintain a destitute husband who becomes a charge on the parish.

[68] Gabriel v. Mullen, 111 Mo. 119; Leake v. Lucas, 65 Neb. 359. The Iowa statute makes husband and wife jointly liable for necessaries furnished the family, and this is construed to include necessaries furnished an incapacitated husband. Murdy v. Skyles, 101 Ia. 549.

utes primarily recognize and secure a social interest in the family as a social institution. In California and in North Dakota, legislation goes further.[69] The code of North Dakota provides:

> "The husband must support himself and his wife out of his property or by his labor. The wife must support the husband when he has not deserted her, out of her separate property, when he has no separate property and he is unable from infirmity to support himself."

Under this provision it is held that a proceeding may be maintained directly by an indigent and infirm husband against a wife of means and ability to compel performance of the duty of support.[70] In the civil law, this interest is recognized, the rules securing it having the same history as those securing the like interests of indigent parents and indigent children of full age, and is secured by rules analogous to those which give effect to the latter.[71]

A wife may assert four claims growing out of the marital relation against the world at large. (1) She has an interest in the society of her husband, quite apart from any economic advantage, as something so related to her spiritual existence as to be in effect an interest of personality. (2) She has an interest in the affection of the husband, in all respects analogous to the interest of the husband in the affection of the wife, which is clearly an interest of personality. (3) She has an interest in the chastity and constancy of the husband, involving her self-respect and honor, and hence obviously an interest of personality. (4) She has an interest in the relation as an economically advantageous relation, providing her with support and shelter, which is manifestly an interest of substance. These interests, however, are not all of them recognized to their full extent and are not fully secured even in legal theory. As in the case of the corresponding interests of the husband, the first and the fourth are often closely connected in practice and have not been very well differentiated. The clearest recognition is to be seen in cases where the husband is enticed or induced to abandon the wife or to divert his earnings which should be devoted to her support.[72] Where these interests are infringed by physical injury to the husband or by abduction of the husband, a difficulty arises in that the husband has an action in which he may recover for diminution of his earning power,

[69] Cal. Civ. Code, § 176; N. Dak. Rev. Code (1905) § 4077.

[70] Livingston v. Superior Court, 117 Cal. 633; Hagert v. Hagert, 22 N. Dak. 290.

[71] Planiol, Traité élementaire de droit civil, I, §§ 663, 904; German Civil Code, § 1360.

[72] Foot v. Card, 58 Conn. 1; Bennett v. Bennett, 116 N. Y. 584; Haynes v. Newlin, 129 Ind. 581; Wolf v. Frank, 92 Md. 138.

loss of earnings, and impairment of his ability to support those dependent upon him. The same problem arises in case of like interests of children. The reason for not securing the interest of wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both. Moreover the injury to wife or child is very hard to measure in money. Hence, on a practical balancing of interests the wife is usually denied an action.[73] Professor Wigmore suggests that if the husband waives his action, the wife should be allowed to sue,[74] and this seems eminently proper, since in that event there is nothing to weigh against her interest, and it would remain unsecured unless the action were allowed. Legislation proceeds on this view in the case of disability of the husband or impairment of the husband's earning powers through sale of intoxicating liquor to him[75] and in case of diversion in gambling of moneys which should go to the support of the family.[76] Here the husband's own participation bars an action on his part, and the reasons suggested by Professor Wigmore are applicable. The second interest (and the first when involved along with it) is protected by an action for alienating the husband's affections or for criminal conversation with the husband recognized by the overwhelming preponderance of American authority.[77] The third interest seems to be but partially recognized and only indirectly secured. An action based solely upon this interest is denied.[78] But recovery of damages may be had incidentally in an action based on the second or fourth.[79] Perhaps it need not be said that the observations with respect to the difficulties involved in practical securing of the corresponding interests of the husband apply here also.

It will be seen that the wife's interests in the marital relation as against the world at large are far from being secured fully according

[73] Feneff v. New York C. & H. R. R. Co., 203 Mass. 287; Goldman v. Cohen, 30 Misc. 336. But such action was allowed in Clark v. Hill, 69 Mo. App. 541. Characteristically, this balancing of interests is usually covered up by theories of causation.

[74] Summary of the Principles of Torts, § 42 and note 2.

[75] See 3, note 32, Nagle v. Keller, 237 Ill. 431.

[76] Higdon v. Heard, 14 Ga. 255; Forrest v. Grant, 11 Lea (Tenn.) 305. Where statutes allowing recovery of money lost in gambling permit an action by the loser himself, it is not uncommon to allow an action by or for the benefit of the wife or wife and minor children in case the loser fails to avail himself of the law. Davis v. Orme, 36 Ala. 540; Ervin v. State, 150 Ind. 332; Faris v. Kirtley, 5 Dana (Ky.) 460.

[77] Nolin v. Pearson, 191 Mass. 283, and cases cited.

[78] Kroessin v. Keller, 60 Minn. 372. Cf. Hodecker v. Stricker, 39 N. Y. Suppl. 515.

[79] See the distinction made in Hart v. Knapp, 76 Conn. 135; also cases cited in Nolin v. Pearson, supra, note 77.

to their logical extent. On the whole a line seems to be drawn between intentional infringement of them and negligent infringement.[80] One reason for this, growing out of the necessity of balancing other interests and the difficulties involved in our mode of trial and of assessing damages, has already been suggested. Perhaps a no less cogent reason may be found in consciousness on the part of the courts that very little is actually achieved by the husband's actions, already in the law, which should be applied by analogy to make the law logically complete.[81]

As against the husband, the claims of the wife growing out of the marital relation are two: (1) A claim to the society and affection of the husband, and (2) a claim to support. As to the first, it need not be said that no legal sanctions can control human affections. The interest in the society of the husband was formerly secured by a suit for restitution of conjugal rights. But this has everywhere become obsolete or has lost its efficacy for reasons considered in connection with the corresponding interest of the husband.[82] On the other hand the interest in support is fully recognized and thoroughly secured by proceedings in equity for maintenance,[83] by the legal doctrine that the husband's credit is pledged for necessaries to the wife, so that if he fails in his duty anyone may provide them and hold the husband therefor,[84] by orders of support under modern statutes, especially in domestic-relations courts in the United States and in summary proceedings before magistrates in England,[85] and by criminal prosecutions for non-support,[86] which, however, chiefly secure a social interest.

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[80] E. g. compare cases in note 73 supra with those in notes 72 and 77.

[81] "Such actions would seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured. The power to bring such actions would furnish wives with the means of inflicting untold misery upon others, with little hope of redress for themselves." Kroessin v. Keller, 60 Minn. 372.

[82] Supra, notes 55 and 62.

[83] Oxenden v. Oxenden, 2 Vern. 493. The ecclesiastial courts could compel the husband to maintain the wife out of his own property or by his own labor. Some American courts assert a general jurisdiction of equity to the same effect. Galland v. Galland, 38 Cal. 265; Glover v. Glover, 16 Ala. 440; Almond v. Almond, 4 Rand. 662; Rhame v. Rhame, 1 McCord Eq. 197; Graves v. Graves, 36 Ia. 310. This seems historically unwarranted. But the matter is now well covered by legislation as to alimony which gives ample power to courts of equity jurisdiction.

[84] Bolton v. Prentice, 2 Strange 1214; Ott v. Hentall, 70 N. H. 231. Relief has also been given in equity to one who advanced money to an abandoned wife, where the husband's credit did not avail to procure necessary support. Kenyon v. Farris, 47 Conn. 510; Leuppie v. Osborn, 52 N. J. Eq. 637; Walker v. Simpson, 7 Watts & Serg. 83. But see Skinner v. Tirrell, 159 Mass. 474.

[85] English Summary Jurisdiction (Married Women) Act, 1895, §§ 4, 5, 8. Cf. Ills. Rev. St. (1913) c. 68, § 24; Burns, Ann. St. Ind. (1914) §§ 7876-7.

[86] E. g. Ills. Rev. St. (1913) c. 68, § 24.

Reviewing the whole subject of individual interests in the domestic relations, it will be seen that on the surface the interests of the parent and of the husband are more completely secured than those of the wife and of the child. But under modern legislation and in view of the course of modern decision the difference is often more superficial than substantial. Quite apart from historical survivals, three difficulties are involved in the attempt to secure these interests, which will account for most of the logical anomalies in legal systems on this point. In the first place the interests which have to be weighed against them are more numerous and important than in other cases. There is not only the individual interest of the other party to the relation, but in more primitive social conditions there is the group interest of the family or kindred and in modern social conditions there are the social interests in the family as a social institution, in the protection of dependent persons, and in the rearing and training of sound and well-bred citizens for the future. Again serious infringements of the individual interests in the domestic relations, such as tale-bearing and intrigue, are often too intangible to be reached effectively by legal machinery. Finally, in so far as these interests are in effect interests of personality, they are so peculiarly related to the mental and spiritual life of the individual as to involve in the highest degree the difficulties incident to all legal reparation of injuries to the person.

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